In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 970

WALTER JERROLD FREY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 974

ELDON WAYNE MCKUIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners were tried before a jury in the United States District Court for the Eastern District of Missouri and were found guilty of conspiracy and

mail fraud (18 U.S.C. 371, 1341 and 1342).[1] Each was sentenced to a term of ten years. The court of appeals affirmed in an opinion which recounts the evidence and discusses the issues in careful detail (Frey Pet. A-1 to A-8).

The substance of the scheme was that petitioner Frey, who operated a marine sales company, would get credit information from patrons of his establishment and would thereafter use their names in obtaining credit for persons who would falsely adopt those names. The names of the employers of the former patrons would be changed to names serviced by petitioner McKuin's telephone answering service. As a result, when a bank sought to verify this credit information, it would reach McKuin or his employees; they would give the necessary verification and the credit would be extended. Some of petitioners' employees aided and abetted this scheme upon occasion by impersonating the individuals seeking credit. By this means petitioners obtained credit cards they used separately to obtain quantities of merchandise.

1. Both petitioners urge that the indictment was duplicitous in that the proof showed a multiplicity of schemes rather than a single plan. The contention is not one of law, however, but an argument as to how the facts of this case ought to be characterized. As the court of appeals concluded after careful analy-

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[1] Frey was convicted on eleven counts of the 16-count indictment, McKuin on thirteen. The wife of McKuin was also a defendant and was convicted on two counts, her sentence being suspended. Six other persons were named in the indictment as aiders and abetters, but not as defendants.

sis, the evidence showed a single, comprehensive scheme within whose framework the various purchases were made and the loans obtained. This constituted a single conspiracy. *Blumenthal* v. *United States*, 332 U.S. 539, 558-559. The fact that the various members of a conspiracy may play different roles in executing it, and have dissimilar motives for participating therein, does not mean that a single conspiracy does not exist. Since the scheme was singular, it was proper to try both petitioners together.

2. McKuin urges that the trial court's rulings during the testimony of government witness Bishop were unfair to him. Bishop, an automobile salesman, testified that he was involved in selling a car to a person representing himself as Jess C. Cummings, who in fact was petitioner McKuin (Tr. 375-378). The United States Attorney asked whether Bishop saw McKuin sign certain papers. After the witness said he could not recall who signed the papers, the court excused the jury and warned Bishop to answer the questions (Tr. 378-382). After the jury returned, the witness refused on grounds of self-incrimination to state whether he took the credit information on this sale and also whether he sold a car to a Kenneth Pohlmann. The objections were sustained (Tr. 382-383). The witness then answered other questions (Tr. 383-385). On cross-examination by McKuin's counsel, Bishop refused to answer, on grounds of possible self-incrimination, questions whether he knew the name Pohlmann was fictitious and whether he was unemployed (Tr. 388, 390).

Subsequently McKuin asked for a mistrial because Bishop had refused to answer questions on Fifth Amendment grounds. He argued that the prosecution must have known that Bishop intended to do so, but the United States Attorney said that the refusal of the witness to answer came as a complete surprise to him. The court, noting that the witness had answered the question in a statement to a postal inspector, expressed confidence that the prosecutor had no idea that the witness was going to refuse and denied the motion (Tr. 394-396). Counsel for Frey, who had joined in the motion, asked the court to instruct the jury to disregard the refusal of Bishop to testify on Fifth Amendment grounds and the court so instructed (Tr. 396-397).[2]

McKuin urges that he was prejudiced not only by the witness' claim of the Fifth Amendment, but also by the court's instruction to disregard the occurrence, which, he claims, precluded cross-examination. McKuin's counsel made no objection to the court's instruction, as co-counsel had requested, that the jury should disregard the claim of privilege, and he did not seek at any point to ask further questions on cross-examination. There is no rational ground for assertion that the "witness' refusal to answer added critical weight to the prosecution's case in a form

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[2] The government subsequently moved to recall the witness, who had said he wished to clarify some matters. The court, however, first sought to ascertain whether the witness still wished to claim the privilege. When the witness said he did, the court refused to permit him to testify (Tr. 404-409).

not subject to cross-examination". *Namet* v. *United States*, 373 U.S. 179, 186-187.

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1970.

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